

No. 14329

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**United States Court of Appeals  
For the Ninth Circuit**

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RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

---

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**PETITION FOR REHEARING *EN BANC***

---

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,  
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## PETITION FOR REHEARING *EN BANC*

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*To:* The Honorable Homer T. Bone, Circuit Judge,  
The Honorable William E. Orr, Circuit Judge,  
The Honorable William T. Hastie, Circuit Judge.

Appellant, Rayonier Incorporated, aggrieved by this Court's September 1, 1955, decision affirming summary dismissal of appellant's complaint, respectfully petitions hereby for an *en banc* rehearing of this appeal.

### GROUND

Summarized, appellant's grounds for a rehearing *en banc* are:

(1) The Opinion decides important questions of Washington law in a way in conflict with applicable Washington law:

(a) As respects proximate cause; termination of risk; and duties of landowner to fight fire on his land and to pursue and extinguish same.

(b) By citing a Washington Supreme Court decision but holding contrary to it.

(c) Because it is premised, in part, upon an erroneous understanding of fact with respect to the title and control of the land upon which the fire started. As a result, inapplicable authorities are cited in the opinion; erroneous statements are made as to the relationships and duties of the Government and of the railroad to appellant; and the *Dalehite* case (if that case is applicable at all) is extended to immunize the Government from liability for fires tortiously caused by Government employees on the Government's own land.

(2) The Opinion decides a federal question in a way in conflict with applicable decisions of the United States Supreme Court as respects:

(a) Rules governing the construction of a complaint subject to a motion to dismiss;

(b) Federal Tort Claims Act requirements that the law of the State shall determine the Government's liability.

(3) The Opinion decides important questions of federal law, heretofore unsettled by any court, as respects the application of the principles of municipal corporation law to actions against the Government under the Federal Tort Claims Act. The unsettled questions are:

(a) Is the "public fireman" pronouncement of the *Dalehite* case a controlling principle of law or was it expressed as *obiter dictum*?

(b) How can the "public fireman" immunity become a settled, controlling principle of law in Federal Tort Claims Act cases without legislative changes.

(c) If the "public fireman" immunity of mu-

municipal law is to be a controlling principle of Federal Tort Claims Act law, should not the equally "doctrinally sanctified" exceptions to that immunity also be carried over and applied to Federal Tort Claims law and the Government be liable in the same exceptional circumstances in which cities are liable for the negligence of their public firemen? Should such "public fireman" immunity apply only to federal fire departments analogous to municipal fire departments or should it apply also to the Forest Service; and should it apply so as to immunize the Government from Forest Service negligence and non-fire-fighting activities and duties? Should distinction be made between "proprietary" and "governmental" functions as in municipal law?

(4) The Opinion discusses questions not put in issue by Government counsel nor raised by the Court during oral argument. Appellant should have opportunity to be heard on those questions.

### PROXIMATE CAUSE

The fire which started on Government owned and controlled land on August 6 burned continuously thereafter and did the damage complained of. Fire burned in a natural and continuous sequence, unbroken by any new independent cause, and produced the damage to Rayonier's property, and without that fire which started August 6 the damage to Rayonier's property would not have occurred. Fire-hazardous conditions and practices on Government owned and controlled property negligently permitted by the Government effectively contributed to and made possible the fire which started August 6. Under Washington law those conditions and

practices and the fire which started August 6 were the proximate cause of the damage.

*Squires v. McLaughlin* (1953) 44 Wn.2d 43, 265 P.2d 265.

Proximate cause is a question of fact, not a question of law, except in rare circumstances, and should be determined by the trier of the facts.

*McInnis v. Squires* (1925) 136 Wash. 10, 238 Pac. 925;

*McLeod v. Grant County School District* (1953) 42 Wn.2d 316, 255 P.2d 360;

*Fleming v. Seattle* (1945) 45 Wn.2d 477, 483, 275 P.2d 904;

*Palin v. General Construction Co.* (1955) 147 Wash. Dec. 223, 287 P.2d .....

Paragraph XXXVI of the Complaint (R. 29) alleges that each of the acts of negligence described in the Complaint was a direct and proximate cause of the damage. Rules of Civil Procedure, Rules 8(e) and (f) provide that pleadings shall be simple, concise and direct, that no technical forms are required and that all pleadings shall be so construed as to do substantial justice. Forms 9 and 10, approved by Rule 84, indicate that in pleading proximate cause it is necessary only to state the facts and then say: "As a result, plaintiff [was injured, etc.]." The Opinion does not suggest any lack of adequacy in the allegation of paragraph XXXVI of the Complaint in stating that the damage was the result of the acts described.

The Complaint must be construed in a light most

favorable to the plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.<sup>1</sup> We submit the Opinion has not done this. Appellant is entitled to have the question of proximate cause determined in the trial of the case. If, as the Opinion implies, there are questions of unforeseeable intervening force, superseding cause or termination of risk, those likewise are matters of defense and questions of fact on which we are entitled to be heard. There is nothing in the record justifying those questions at this time nor justifying a dismissal on those grounds.

The Opinion is obscure and confusing on the question of proximate cause, intervening force and termination of risk. It says, page 3:

“\* \* \* In our opinion it was this *recurrence* of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. \* \* \*” (Emphasis added)

Why was such “recurrence” of fire the sole proximate cause? The Opinion does not explain. The fire did not recur. It was the same fire that started August 6 still burning, the same men still acting, the same timber which was in jeopardy, and the same dry weather conditions. The fire did not start in the 1600-acre tract. It would not have reached the 1600-acre tract or ever started were it not for the conditions and events which occurred before it reached that tract.

When did the risks, created prior to the containment

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<sup>1</sup>See authorities cited, Op. Br., p. 13.

of the fire, terminate and what caused them to terminate? The Opinion does not explain. Does the Court intend to imply that when one responsible for the start of a fire has it contained and under control his duty has ended or that the risk of fire has thereby terminated? If so, that is contrary to Washington law.

The Washington statutes<sup>2</sup> establish that the risk from fire does not terminate until the fire is extinguished. They require, in so many words, that the landowner *and* the party responsible for the fire and the fire-hazardous conditions both control *and* extinguish the fire. A doctor's obligation does not end when he stops the flow of blood; he must disinfect the wound and sew it up. Half-way measures are no more tolerated by Washington forestry laws.

Does the above quote from the Opinion imply that there was an intervening force or superseding cause which ended the force of the original cause? The Opinion does not explain, although the authorities cited in Opinion footnote 1 in support of the quote suggest that the Court might have in mind some intervening force or superseding cause. Those authorities deal with unforeseeable intervening forces and superseding cause. They are not applicable to the facts in the case at bar because the Complaint here specifically alleges that everything contributing to the September 20 breakaway fire was foreseeable and could have been guarded against and avoided by prudent conduct. This includes the pre-August 11th condition of and practices on the Government owned and controlled right of way and

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<sup>2</sup>See Op. Br., pp. 21-23, 65, 70, 71.

adjoining lands (R. 11-13) and the wind and weather (R. 10, 15, 23, 24, 27).

The only intervening force apparent to us is the Forest Service employees' negligence in doing nothing. The Opinion quotes paragraph XXXII of the Complaint, which describes the Forest Service doing nothing, and then simply says:

“On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.”

The Opinion says that at this point the Forest Service employees became public firemen. It implies that if the Government is negligent only once in its capacity as landowner it will be held accountable, but if it is negligent twice, once as a landowner and later as a public fireman, it will not be liable at all.

We are unable to learn from the opinion why the Court has ruled as it has with respect to proximate cause and related matters. The problem, as treated by the Opinion, was not raised by Government counsel nor by the Court during oral argument. We have never been notified that anyone thought such problem exists, nor have we ever been heard on the subject or had opportunity to present our views. This situation, by itself, justifies a rehearing in this case.

### **THE DALEHITE CASE**

The Opinion first divorces plaintiff's damage from events occurring prior to August 11 by stating that risks, if any, created by acts or omissions of the Government prior to the containment of the fire in the 1600-acre tract (which occurred on August 11) had ter-

minated, and that it was the “recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury”. This holding of the Opinion is, in our judgment, clearly erroneous, as above noted. Acts and omissions prior to that date, as well as conduct subsequent to that date, all proximately caused the injury and the complaint should properly be so construed. If we are correct in this, then we have the question whether the pre-August 11th occurrences constituted negligence on the part of the Government. That subject is discussed later. Assuming for the moment that such negligence existed prior to August 11, can the Government then claim that the “public fireman” immunity principle suggested by the *Dalehite* case intervenes and precludes recovery for pre-August 11th negligence which proximately caused the injury, regardless of whether there was or was not negligence after August 11? In other words, can the Government escape liability for its negligent acts simply by putting on a fireman’s hat after its negligence has occurred and thereafter participating in the events which lead to the damage?

If this Court feels that the “public fireman” immunity of municipal corporation law is applicable under the Federal Tort Claims Act to the case at bar, should not the exceptions to such immunity, which make municipalities liable for acts of their public firemen under certain circumstances, also be applied in construing the Federal Tort Claims Act?

Since “public fireman” immunity is the child of municipal corporation law, should not such law’s distinction between “governmental” and “proprietary” func-

tions also be projected into Federal Tort Claims Act law?

We can add little to the discussion of these questions in Opening Brief, pages 36 through 57, and Reply Brief, pages 13 to 17. We make only the following additional observation on the Opinion's treatment of the *Dalehite* case.

In an effort to bring this case within the "public fireman" immunity principle referred to in the *Dalehite* decision, the Opinion erroneously characterizes the activities of the Forest Service. It says, page 5:

"\* \* \* The [forest] service has entered into several agreements similar to the one alleged to be in force here *whereby it assumes the state function of suppressing fires* on all lands within a particular area, whether publicly or privately owned. \* \* \*" (Emphasis added)

We submit that fighting and suppressing forest fires is not a "state function," *per se*, at least in the State of Washington. It is true that some state officers are authorized or required to fight forest fires; but the forestry statutes, both of the State of Washington and of the United States, approach the fire control problem as one common to private individuals, the State and the United States as timber owners, and authorize agreements whereby either the private timber owner, the State timber owner or the Federal timber owner may be the one who assumes responsibility for taking the initiative in preventing and fighting fires (See Op. Br., pp. 25, 58, 59). The statutes, therefore, do not regard this as a state or governmental function.

Since the Opinion is silent as to the Court's judgment

as to whether the post-August 11th occurrences and conditions constituted negligence, we must assume that the Court agrees that the Government was guilty of negligence after August 11 and that such negligence was a proximate cause of plaintiff's damage. The Opinion disposes of this facet of the case by holding that it is controlled by the *Dalehite* decision and that the Government is immune because from August 11 on the Forest Service employees were public firemen.

We earnestly repeat our belief that the "public fireman" immunity language of the *Dalehite* decision is *obiter dictum*; that the facts in the *Dalehite* case were not comparable to those in the case at bar,<sup>3</sup> principally because in *Dalehite* the Coast Guard had no duty to fight the fire and hence there was no breach of duty upon which negligence must be based, whereas in this case there was a clear duty on the Government, which was breached.<sup>4</sup>

The questions posed above and in our Briefs, the implications arising and the perplexity and confusion which would be created through extension of municipal corporation law to the application of the Federal Tort Claims Act are apparent from these questions. They are matters of grave and far-reaching importance which justify and, to our minds, compel a rehearing *en banc* in this case in order that the whole Court may have opportunity to consider the problem and establish a guide which will serve as sound precedent for other cases which will inevitably follow.

<sup>3</sup> For full discussion, see Op. Br., pp. 36-57, and Reply Br., pp. 13-15.

<sup>4</sup> See Op. Br., pp. 15-26.

**PRE-AUGUST 11th NEGLIGENCE**

After having concluded that the sole proximate cause of plaintiff's damage was the spread of the fire from the 1600-acre tract and that the negligence of the Forest Service employees from that time on was not actionable because of the "public fireman" immunity, the Opinion discusses some but not all of the other points made by appellant. We feel that the Opinion's conclusions on other points discussed by it are in error and that such error stems in several material respects from a misunderstanding of the facts.

It is patent from the Opinion's language on page 6 that the Court misunderstands the facts concerning title to and control of the railroad right of way and the influence of those facts on this case. The Complaint (R. 11) states that the Government "owned, had control of and free and unrestricted access" both to the railroad right of way and the adjoining lands. We submit that the Opinion disregards that allegation and unjustifiably assumes the facts to be different than as alleged. The Opinion (pp. 6 and 7) implies that the Government had only "a right to enter and inspect the right of way" and that such was the limit of its rights and title. That is contrary to the Complaint. From the cases cited on page 6 both in the text and in the footnote, the Opinion apparently adopts the erroneous supposition of the Government's Brief. We direct attention to the parenthetical statement in our Reply Brief, page 5.

From such erroneous treatment of the facts, the Opinion then discusses, and cites authorities applicable only to the rights and duties of the owners of dominant

and servient estates as between themselves. That is not pertinent to the case at bar. Regardless of the rights and duties of the Government and the Railroad Company, *inter sese*, Rayonier, as a third party, has been damaged, and under the facts pleaded it has a right, if it so chooses, to hold either or both of the dominant and servient owners accountable.

Based upon such incorrect treatment of the facts, the Opinion erroneously nullifies the Government's liability and responsibility as one owning and having control of the right of way.

It thus treats the Government as "an adjoining landowner to whose property fire, ignited on the property of a third party, has spread." (p. 7). Such is not the fact. The fire was ignited on the Government's property, spread to additional Government property and then pursued its course which ultimately reached Rayonier's timber. Furthermore, the Opinion erroneously implies that the land adjacent to the right of way is of a character similar to that involved in cases such as *Leroy Fibre Co. v. Chicago M. & St. P. R. Co.* (1914) 232 U.S. 340, and those cited in Opinion footnote 4. Those cases hold there is no contributory negligence by the plaintiff who has failed to conform use of his land to the use of adjoining land and has suffered damage as a consequence. Typically, they are urban, industrial situations where a plaintiff builds a warehouse adjacent to defendant's theretofore established railroad or chemical plant which is a known fire hazard. Granting that in some such cases a landowner is not required to conform the use of his land to that of the adjoining land, the

principle invoked in those cases is not applicable to the case at bar. The lands here involved are forest lands, useful for no other purpose. The railroad right of way runs through forest lands. The Washington forestry statutes require that all such lands, including railroad right of way and adjoining lands, be cleared of debris because of the fire hazard. The Washington law requires that all such lands conform to standards which will minimize or eliminate fire risk, regardless of the use to which the same may be put. It is to that extent and to that extent only that we insist the Government lands adjoining the right of way must conform. Failure to conform to the standard thus established is negligence.

In discussing the cases on this subject the Opinion (p. 7) acknowledges "There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover against the party responsible for the fire. \* \* \*" The Opinion then cites the Washington case of *Stephens v. Mutual Lumber Co.* (1918) 103 Wash. 1, 173 Pac. 1031, as one of the authorities holding that failing to conform the use of one's land to that of the adjoining land is negligence, but then adopts the opposing line of cases as this Court's ruling, in direct conflict with the applicable Washington case. If there is a division of authority, the case at bar should be controlled by the Washington decisions and not by *Leroy Fibre Co.*, a case with a Minnesota background.

In discussing this same question, the Opinion declines to follow the only case cited to the Court which is direct-

ly in point<sup>5</sup> because it is an "extreme" one. Washington law is extreme in the standards required to protect against forest fire hazards, and those standards are comparable to the standards sustained in the *Riley* case.

The Opinion states that Rem. Rev. Stat. §§5807 and 5818 impose liability without fault (p. 9). We believe that statement is contrary to Washington law. *State of Washington v. Canyon Lumber Corp.* (1955) 146 Wash. Dec. 648, 284 P.2d 316.

The Opinion seems to miss the point made by us and the primary purpose for which the several statutes were cited in our briefs. We do not assert liability of the Government without fault because of violation of the statutes. We cited those statutes for the purpose of showing the high standard of conduct and degree of care set by the Washington Legislature to be met by all who own or are in possession of forest land in the state. Statutes, even criminal statutes, are properly used to determine the standard of care, failure to conform to which may be the basis for civil liability for negligence. See Opening Brief, pp. 21-23, Reply Brief, pp. 5-9 and cases therein cited. See also *Pig'n Whistle Corporation v. Scenic Photo Pub. Co.*, 57 F.2d 854 (9th Cir. 1932).

The Opinion filed September 1 makes no reference to this well established principle. It is clear under the allegations of the Complaint that the Government did not maintain either its lands on the right-of-way or on its lands adjoining the right-of-way to the minimum standards set by Washington statutes. It has not been sug-

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<sup>5</sup> *Riley v. Standard Oil Co. of Indiana* (1934) 214 Wis. 15, 252 N.W. 183.

gested by any one that the Government, as owner of lands in forest areas, should not be required to conform to those standards. This principle is basic and goes directly to the question of whether the Government was or was not guilty of negligence which contributed to and was a proximate cause of the fire. The Opinion's treatment of the question is in conflict with the public policy established by Washington statutes and court decisions, and is in conflict with prior decisions of this Court and others which hold that even criminal statutes may determine the standard of care in negligence cases.

On page 9 of the Opinion the Court observes:

“\* \* \* To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule.”

This comment is made with respect to a fire which starts on the land of a third party.

We submit that the Court's observations here are erroneous for two reasons. In the first place, the fire started on land which “defendant owned, had control of and free and unrestricted access to” (R. 11). It did not start on land of another and then spread across the Government's land. Secondly, the statute, Am. Rem. Supp. 1945 §5806, R.C.W. §76.04.380, prescribes a standard of care for “the owner, operator or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands.” We do not know whether the Opinion was written with the above quoted section of the statute in mind because the

quotation of §5806 in footnote 8 of the Opinion is the form in which that section appeared in the 1917 laws but in which the quoted language does not appear. For the convenience of the Court we have included in the Appendix to this Petition a copy of the statute, Am. Rem. Supp. 1945 §5806, R.C.W. §76.04.380, which was in effect in 1951 and which contains the language above quoted.<sup>6</sup> The Opinion comments that the landowner's duty does not become operative until receipt by him of written demand from a state official. For the purposes here cited, that part of the statute is obviously immaterial because the Forest Service had immediate actual notice of the fire from its inception and actively participated in fighting it at all times thereafter. The important thing is that the statute imposes a standard of conduct failure to conform to which is negligence.

We think it material also that the Opinion does not comment on Rem. Rev. Stat. §2523, R.C.W. §76.04.220, which, while a criminal statute, establishes a standard of conduct. That statute reads as follows:

“76.04.220. *Negligent fires—Penalty.* Every person who wilfully or negligently sets, or fails to carefully guard, or extinguish any fire, whether on his own land or the land of another, whereby the tim-

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<sup>6</sup> It is with compassion that we direct this inadvertence to the Court's attention. In checking this matter, we find that in the Appendix to our Opening Brief we quoted §5806 in its form immediately prior to the 1951 amendment. However, the critical portion of the statute was substantially the same in both the 1951 law and that in effect immediately prior thereto. Also, Opinion footnote 6 quotes the 1917 form of §5807 (See p. 14, *supra*). The 1951 form of this statute appears in Reply Brief Appendix for the Court's convenience.

ber or property of another is endangered, or who fails to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor. (1909 c. 249, §271; R.R.S. §2523) ”

We again ask the question put by our Opening Brief (p. 43) which has been ignored and unanswered by Government counsel, which is not referred to in the Opinion and which, if answered, we believe will give the correct result in the case at bar.

“Let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier the defendant, and that the conditions, acts and omissions described in the Complaint were those created, tolerated or committed by Rayonier and its employees. Is there any reason in fact or in law why the positions of the parties could not be transposed in all material respects and, in such example, would Rayonier be liable to the United States?”

## CONCLUSION

In our judgment, the issues involved in this case are of major importance and deserving of careful consideration by the full Court. We believe that the Opinion contains unfortunate expressions in conflict with Washington law which, by terms of the Federal Tort Claims Act, should control; and which are in conflict or irreconcilable with principles of law previously subscribed to by this Court and the United States Supreme Court. As noted above, the Opinion has developed theories not urged by Government counsel nor suggested by the Court at the time of oral argument, presumably because

they were not judged to be properly involved in the case. For that reason, we feel we have not had our full day in court. In the interests of fairness and substantial justice, as well as for important policy reasons, we petition for a rehearing by the Court of Appeals sitting *en banc*.

Respectfully submitted,

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### CERTIFICATE OF COUNSEL

Lucien F. Marion and Burroughs B. Anderson certify hereby that they are counsel for appellant herein; that appellant makes the foregoing Petition for Rehearing *En Banc* in good faith and that, in their judgment and in the judgment of each of them, the said petition is well founded and is not interposed for delay.

LUCIEN F. MARION,

BURROUGHS B. ANDERSON,  
*Attorneys for Appellant.*

## APPENDIX

Am. Rem. Supp. 1945 §5806; R.C.W. §76.04.380:

*“Uncontrolled fire a public nuisance—Abatement—Costs.* Any fire on any forest land burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

“The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under laws pertaining to slash responsibility.

“When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor, or his authorized deputies. (1951 c. 58 §9, last am'ds 1917 c. 105 §3; formerly Rem. Supp. 1945 §5806.)”